NO. 82-1947

IN THE

Supreme Court of the United States

ERICH KOKER and BEATRICE KOKER,

Appellants,

vs.

FREDERICK V. BETTS and JANE DOE BETTS, his wife, and their marital community, and SKEEL, McKELVY, HENKE, EVENSON & BETTS, Law Firm of Frederick V. Betts,

Appellees No. 1,

and

KENNETH L. LeMASTER and JANE DOE LeMASTER, his wife, and their marital community, and SAFECO INSURANCE COMPANY OF AMERICA, and GENERAL INSURANCE COMPANY OF AMERICA, and FIRST NATIONAL INSURANCE COMPANY OF AMERICA,

Appellees No. 2.

MOTION TO DISMISS OR AFFIRM

INGRID W. HANSEN
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PREFACE

Appellants Erich and Beatrice Koker have filed a notice of appeal in the Supreme Court of the State of Washington. The notice does not meet the jurisdictional requirements for appeal of U.S.C. § 1257(1) or (2). This motion is pursuant to U.S.C. 28 § 2103.

QUESTIONS PRESENTED FOR REVIEW

No question is presented for review by the United States Supreme Court as there is no matter within the confines of U.S.C. § 1257 presented by this case.

PARTIES TO THE PROCEEDING

All parties are listed in the caption of the case.

REPORTS OF OPINIONS

No reports of any opinions were published. The filed opinion of the Court of Appeals, Division I of the State of Washington dated July 6, 1982 is in the Appendix. A motion for reconsideration was denied August 5, 1982, and petition for review by the Washington State Supreme Court was denied

November 5, 1982. A motion for reconsideration was denied January 7, 1983.

STATEMENT OF THE CASE

No federal question was involved at any stage the proceedings below. The case arises from Ms. Koker's dissatisfaction with the result in a 1976 personal injury action seeking damages for injuries she sustained in a 1971 automobile accident. F. V. Betts, then of Skeel, McKelvy, Henke, Evenson & Betts, represented Ms. Koker at trial. Ms. Koker then brought this action alleging legal malpractice, conspiracy, misrepresentation, fraud, deceit and outrage. The trial court dismissed the complaint as to all issues but legal malpractice. On appeal to the Court of Appeals, the dismissals were affirmed, and in addition the legal malpractice claim was ordered dismissed as the evidence presented by Ms. Koker on the motion for summary judgment was insufficient to raise an issue of material fact concerning alleged malpractice.

Ms. Koker's attempts to have further review beyond the Washington State Court of Appeals were denied. The Court of Appeals denied rehearing, and

the State Supreme Court refused to accept review. Ms. Koker now apparently claims that this appellate process denied her certain constitutional rights.

Ms. Koker's claims are completely devoid of merit. Her case was determined on a motion for summary judgment and reviewed by the appellate court in the State of Washington. No issue of the type necessary for jurisdiction in the Washington State Supreme Court was raised. The findings of the appellate courts in the State of Washington that this case does not merit further consideration do not constitute any denial of due process or other constitutional right.

CONCLUSION

Appellees urge this Court to dismiss the Kokers' jurisdictional statement or refuse jurisdiction.

Respectfully submitted,

BETTS, PATTERSON & MINES, P.S.

By _____
Ingrid W. Hansen
Attorneys for Appellees No. 1

APPENDIX

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

ERICK KOKER and BEATRICE E. KOKER, husband and wife, Appellants, v. FREDERICK V. BETTS and JANE DOE BETTS, his wife, and their marital community, and SKEEL, McKELVY, HENKE, EVANSON & BETTS, Law Firm of FREDERICK V. BETTS, Respondents, and KENNETH L. LeMASTER and JANE DOE LeMASTER, his wife, and their marital community, and SAFECO INSURANCE COMPANY OF AMERICA, and GENERAL INSURANCE COMPANY OF AMERICA, and FIRST NATIONAL INSURANCE COMPANY OF AMERICA, Defendants.	No. 9346-1-I DIVISION ONE FILED JUL 6 1982

PER CURIAM.--Plaintiff Beatrice E. Koker appeals from a summary judgment dismissing her complaint for 1) conspiracy, 2) misrepresentation, fraud, deceit, and 3) outrage. Defendant, Frederick V. Betts,

cross-appeals from a denial of his motion for summary judgment on the claim of legal malpractice.

FACTS

Beatrice Koker and her husband, now deceased, brought a personal injury action in 1976, Koker v. Sage, King County Cause No. 77360, seeking damages for injuries she sustained in a 1971 automobile accident. Liability was admitted and the jury returned a verdict of $4,600 in favor of Koker. She was represented at trial by Betts.

Koker, acting pro se, appealed the judgment, which was subsequently affirmed by this court in an unpublished opinion. Koker v. Sage, Court of Appeals, Division I, No. 4916-I, petition for review denied 91 Wn.2d 1014 (1979).

Koker commenced this action against Betts alleging 1) legal malpractice, 2) conspiracy, 3) misrepresentation,

fraud and deceit, and 4) outrage. The trial court determined that there existed no material issue of fact and granted summary judgment in favor of Betts on all claims except legal malpractice.

CONSPIRACY

Initially, Koker argues that Betts and Kenneth L. LeMaster, attorney for the Sages, conspired to deprive her of a fair trial in Koker v. Sage, supra.

Koker presented many assertions of an alleged agreement between Betts and LeMaster to create a conspiracy; however, after a careful review of such claims we conclude that such assertions, even if true, do not constitute conspiracy.

In Washington, actionable civil conspiracy exists if two or more persons have by agreement combined to accomplish an unlawful purpose. Corbit v. J.I. Case Co., 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967);

Allard v. Board of Regents, 25 Wn. App. 243, 247, 606 P.2d 280 (1980). The evidence is sufficient only if the facts and circumstances relied upon to establish the conspiracy are inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy. Baun v. Lumber & Sawmill Workers Local 2740, 46 Wn.2d 645, 656, 284 P.2d 275 (1955); O'Brien v. Larson, 11 Wn. App. 52, 56, 521 P.2d 228 (1974). This evidence must be clear, cogent, and convincing. Corbit v. J.I. Case Co., supra at 529; O'Brien v. Larson, supra at 55.

A motion for summary judgment will be granted only if, after viewing all the pleadings, affidavits, depositions, admissions and all reasonable inferences therefrom in favor of the nonmoving party, it can be said (1) that there is no genuine issue of material fact, (2) that reasonable

persons could reach only one conclusion, and (3) that the moving party is entitled to judgment as a matter of law. Peterick v. State, 22 Wn. App. 163, 180-81, 589 P.2d 250 (1977). To avoid summary judgment, the nonmoving party may not rely solely on speculation and argumentative assertions. Upon the submission by the moving party of adequate affidavits, the nonmoving party must set forth specific facts to rebut the moving party's contentions and show a genuine issue of material fact. Allard v. Board of Regents, supra at 247; Peterick v. State, supra at 181.

Koker alleges that various actions and statements by the two attorneys during and after trial constituted a conspiracy to deprive her of a fair trial.

From an examination of the record, it appears that all of these statements and events are consistent with a lawful purpose and not reasonably consistent with the

existence of a conspiracy. There is no evidence of an "agreement." There are no written communications or contracts, or conversations which would create even a suspicion of a conspiracy. Further, it appears that Betts had a contingent fee arrangement with Koker which is inconsistent with the existence of a conspiracy. Since there is no evidence of an agreement, a conspiracy cannot be established as a matter of law. Corbit v. J. I. Case Co., supra. The trial court did not err in granting summary judgment as a matter of law on this issue.

MISREPRESENTATION, FRAUD & DECEIT

Next, Koker alleges that Betts committed misrepresentation, fraud and deceit by failing to disclose to the trial court that various statements made by LeMaster were untrue.

In Washington in order to recover in a cause of action for fraud the following elements must be established:

> (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage.

Sigman v. Steven-Norton, Inc., 70 Wn.2d 915, 920, 425 P.2d 891 (1967); Martin v. Miller, 24 Wn. App. 306, 308, 600 P.2d 698 (1979). Because they are so easy to assert, fraud and deceit must be established by clear, cogent and convincing evidence. House v. Thornton, 76 Wn.2d 428, 433, 457 P.2d 199 (1969).

Whether a misrepresentation was made with intent to deceive is a question of fact. Wilburn v. Pioneer Mutual Life Insur. Co., 8 Wn. App. 616, 620, 508 P.2d

632 (1973). However, if all the facts and circumstances are consistent with an honest intent, fraud is not proved. Marrazzo v. Orino, 194 Wash. 364, 377, 78 P.2d 181 (1938).

From an examination of the record, Koker has not presented any evidence of LeMaster's intent to misrepresent, deceive or commit a fraud on either Koker or her counsel.

OUTRAGE

Next, Koker argues that the trial court erred when it held as a matter of law that Bett's conduct was not so extreme and outrageous as to permit recovery under the tort of outrage.

In order to recover under this theory the following elements must be established; (1) emotional distress must have been inflicted intentionally or recklessly (mere negligence is not enough); (2) the conduct of the defendant must have been outrageous

and extreme; (3) the conduct must have caused severe emotional distress to the plaintiff. Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

Recovery for outrage can only be had if the conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Grimsby v. Samson, surpa at 59; Restatement (Second) of Torts § 46, comment d (1965).

Whether conduct was extreme and outrageous is for the court to determine; if reasonable people might differ, then the question is for the jury. Bowe v. Eaton, 17 Wn. App. 840, 845, 565 P.2d 826 (1977); Restatement (Second) of Torts § 46, comment h (1965).

In the instant case there is no evidence of any intentional or reckless

acts. In fact Koker stated at the hearing before the trial court, "I don't see that these people want to go about doing harm deliberately." Such statements are inconsistent with a claim for outrage. Grimsby v. Samson, supra. Even though the extreme and outrageous character of the conduct may arise from the actor's superior position, no liability results from "mere insults, indignities, or annoyances." Contreras v. Crown Zellerbach Corp., (Stafford, J., concurring), 88 Wn.2d 735, 744, 565 P.2d 1173 (1977); Restatement (Second) of torts § 46 comment e. The trial court properly dismissed this cause of action as a matter of law. Bowe v. Eaton, supra.

LEGAL MALPRACTICE

Betts argues in his cross-appeal that summary judgment should have been granted on the issue of legal malpractice because the affidavit of Koker's expert is insufficient to create an issue of fact.

A plaintiff in a medical malpractice case must establish a standard of care, and violation of that standard, through expert testimony, unless laymen would have no difficulty recognizing the claimed negligence as a departure from prevailing standards. Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979); Swanson v. Brigham, 18 Wn. App. 647, 651, 571 P.2d 217 (1977).

In support of her claim Koker filed the affidavit of Chas. Talbot, an attorney, which states:

> I am unable to form an opinion as to whether Mr. Betts' handling of the case met the applicable professional standards. The record shows numerous instances of highly questionable acts and omissions by Mr. Betts, which suggest, but do not conclusively establish, significant deviations from acceptable practice.

(Italics ours.) When an expert cannot state an opinion, his testimony is inadmissible. O'Donoghue v. Riggs, 73 Wn.2d 814, 822, 440 P.2d 823 (1968). Affidavits

opposing a motion for summary judgment "shall set forth such facts as would be admissible in evidence." CR 56(e). Since Talbot's affidavit did not state an opinion no material issue of fact is raised. In addition, there is no other evidence which creates a material issue of fact. The trial court erred in not granting summary judgment.

Affirmed in part. Reversed in part.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED.

/s/_____
CHIEF JUDGE